A.F.R.

1/8 (104)

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.1154 of 2002

APPELLANTS: Sonraj Jangade and another
(In Jail)

- Versus -

RESPONDENT: State of Chhattisgarh

JUDGMENT FOR CONSIDERATION

Sd/-
L.C. Bhadoo
Judge

HON'BLE MR. SUNIL KUMAR SINHA, J.

Sd/-
Sunil Kumar Sinha
Judge

POST FOR JUDGMENT ON 01 - 08 -2007

Sd/-
L.C. Bhadoo
Judge

(105)

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.1154 of 2002

APPELLANTS:
(In Jail)

1. Sonraj Jangade,
S/o Chintaram Jagde,
aged 40 yrs.,
R/o Village Lachhanpur,
P.S. Kunda,
Distt. Kawardha, Chhattisgarh.

2. Daneshwar (Daaneshwar)
Jangde, S/o Sonraj Jangde,
aged 22 yrs.,
R/o Village Lachhanpur,
Distt. Kawardha, Chhattisgarh.

- Versus -

RESPONDENT: State of Chhattisgarh,
Through the S.H.O., P.S. Kunda,
Bilaspur.

{Criminal appeal under Section 374 (2) of the Code of Criminal Procedure}

Appearance:

Mr. S.L. Bajaj, counsel for the appellants.

Mr. Ashish Shukla, Additional Public Prosecutor for the State/respondent.

Division Bench: Hon'ble Mr. L.C. Bhadoo and Hon'ble Mr. Sunil Kumar Sinha, JJ.

JUDGMENT

(Delivered on 1st May, 2007)

The following judgment of the Court was delivered by **L.C. Bhadoo, J.**: -

1. By this appeal under Section 374 (2) of the Cr.P.C. the appellants have questioned legality and correctness of the judgment of conviction and order of sentence dated 18-10-2002 passed by the 2nd Additional Sessions Judge (F.T.C.), Mungeli in Sessions Trial No.402/2000, whereby learned Additional Sessions Judge after holding the accused/appellants guilty for commission of offence under Sections 302, 302 in the alternative 302 read with Section 34 and 302 read with Section 34 of the I.P.C. for committing the murders of Sidhram & Yashwant, sentenced each of them to undergo imprisonment for life and to pay a fine of Rs.5,000/-, in default of payment of fine to further undergo R.I. for six months, on each count. It

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was further directed that the substantive sentences shall run concurrently.

2. Case of the prosecution, in brief, is that Deepa Kumari (PW-4) is sister of deceased Yashwant, she was residing along with her brother in Old Basti of Village: Lachanpur, whereas, Kirti Kumari (PW-8) is daughter of deceased Sidhram, she was residing along with her father in New Basti of Village: Lachanpur. Accused Sonraj is also resident of the same village and he is father of accused/appellant Daneshwar.

3. On the occasion of the festival of Lord Ganesh, deity of Lord Ganesh was installed publicly in the public street in front of the house of Gokul Pusad. In the morning of 3-9-2000, Kirti Kumari (PW-8) was cooking meal in her house, whereas her father Sidhram was sitting near the corridor of his house, at that time, Yashwant, nephew of Kirti Kumari, came running from the place of Lord Ganesh festival and entered the house of Kirti Kumari. After picking up Lathi, Yashwant went outside the house saying that a quarrel has taken place with the accused persons. In the mean time, the accused persons also came running towards the house of Kirti Kumari. Accused Sonraj was carrying Tabbal, whereas accused Daneshwar was carrying Lathi, they started abusing in filthy language on which Sidhram enquired as to what has happened. On that, Sonraj attacked Sidhram with Tabbal on his head and accused Daneshwar attacked Sidhram with Lathi on his head as a result of which Sidhram fell down on the ground. Thereafter, Sonraj attacked Yashwant on his head with Tabbal 3-4 times and accused Daneshwar also attacked him with Lathi. The accused persons ran away from the scene of occurrence. Bodies and clothes of both the injured persons namely, Sidhram & Yashwant were drenched with blood. When Sidhram & Yashwant were being taken to Mungeli hospital in a bullock cart, by the time the bullock cart reached Fasterpur, both the injured succumbed to the injuries sustained by them. Kirti Kumari (PW-8) gave Dehati Merg intimation Ex. P-10 at Fasterpur in connection with the death of Sidhram and based on that, merg intimation Ex.P-10A was registered at Police Station: Kunda. Based on the information of Kirti Kumari (PW-8), Dehati Nalishi Ex.P-9 was given to Virendra Kumar Singh (PW-11) in Village: Fasterpur and first information report Ex.P-9A was registered at Police Station: Kunda. In respect of the death of Yashwant, Dehati merg intimation Ex.P-11 was

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given and based on that, merg intimation Ex.P-11A was registered in Police Station: Kunda. Investigation was conducted by A.R. Sahu (PW-10), Assistant Sub Inspector and Virendra Kumar Singh (PW-11), Sub Inspector.

4. The investigating officer after giving notice Ex.P-21 to the Panchas, prepared inquest Ex.P-22 on the body of deceased Sidhram and after giving notice Ex.P-23 prepared inquest Ex.P-24 on the body of Yashwant. Bodies of Sidhram & Yashwant were sent for post-mortem examination to Primary Health Centre, Mungeli where Dr. Vibha Sindur (PW-6) conducted post-mortem on the body of Sidhram. She prepared post-mortem report Ex.P-15. She opined that cause of death was head injury, the death was homicidal in nature. She also conducted post-mortem on the body of Yashwant, prepared post-mortem report Ex.P-17. She opined that the cause of death was head injury leading to coma and death, the nature of death was homicidal. Blood stained soil and plain soil were seized under Ex.P-2 from the place of occurrence where dead body of Yashwant was lying. Accused Sonraj while in police custody gave memorandum Ex.P-3 regarding the place where he kept Tabbal & Lathi, weapons of offences, in pursuance of that, Tabbal (Article 'A') and Lathi (Article 'B') were seized under Ex.P-14. Clothes of accused Daneshwar were seized under Ex.P-5. Tabbal & Lathi were sent to the Assistant Surgeon, Primary Health Centre, Mungeli under Ex.P-29 for her opinion as to whether the injuries found on the bodies of Sidhram & Yashwant could be caused by the weapons. The doctor opined that the injuries found on the bodies of Sidhram & Yashwant could be caused by the weapons in question. Seized articles were sent for chemical examination to Forensic Science Laboratory, Raipur, from where report Ex.P-31 was received.

5. After due completion of investigation, charge sheet was filed against the accused/appellants in the Court of Judicial Magistrate, First Class, Mungeli, who in turn committed the case to the Sessions Judge, Bilaspur, from where learned 2nd Additional Sessions Judge (F.T.C.), Mungeli, received the case on transfer for trial.

6. The prosecution in order to establish charges against the accused/ appellants examined 12 witnesses. Statements of the accused persons were recorded under Section 313 of the Cr.P.C. in which they denied the material appearing against them in the prosecution evidence and stated

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that they are innocent, they have been falsely implicated in the crime in question.

7. Learned Additional Sessions Judge after hearing the arguments of counsel for respective parties, convicted and sentenced the accused/appellants in the aforesaid manner.

8. We have heard Mr. S.L. Bajaj, learned counsel for the accused/appellants and Mr. Ashish Shukla, learned Additional Public Prosecutor on behalf of the State/respondent.

9. At the outset, Mr. Bajaj has not disputed the homicidal death of Sidhram & Yashwant. Moreover, Deepa Kumari (PW-4) & Kirti Kumari (PW-8) have categorically stated in their evidence that accused Sonraj & Daneshwar attacked Sidhram with Tabbal & Lathi, thereafter, they attacked Yashwant with the same weapons as a result of which both of them sustained injuries on head, became unconscious and died on the way when they were being taken to Mungeli hospital in a bullock cart. Above ocular evidence is corroborated by the medical evidence of Dr. Vibha Sindur (PW-6) who has stated in her evidence that she was working as Assistant Surgeon in Primary Health Centre, Mungeli, on 4-9-2000, she conducted post-mortem on the body of Sidhram, blood was oozing out of the left ear, there was big haemotoma on the left parito temporal region, there was incised pierced perforated wound above left ear in the temporal area which was deep up to bone, skull bone was also fractured from that place, temporal bone was found fractured, there was intracranial haemotoma also, brain was lacerated and the death was homicidal in nature on account of head injury. She has further stated that on the same day she conducted post-mortem on the body of Yashwant. She found that there was bleeding from right ear, blood was coming out from nostril & mouth, there was incised pierced perforated wound on left side of occipital temporal area, the bone was found fractured in that area, brain material was lacerated, haemotoma was also found, cause of death was head injury and the death was homicidal in nature. In view of the above ocular and medical evidence, it is established that the death of Sidhram & Yashwant was homicidal in nature.

10. As far as involvement of the accused/appellants in the crime in question is concerned, Mr. S.L. Bajaj, learned counsel for the appellants, argued that in this case, time of occurrence is said to have been the day time,

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at the place of occurrence number of persons were residing, but none of the independent witnesses has been examined in this case except Deepa Kumari (PW-4), sister of Yashwant & Kirti Kumari (PW-8), daughter of Sidhram. In the circumstances, they being closely related to the deceased persons, their evidence cannot be relied upon. He also argued that both these witnesses have stated that accused Sonraj attacked the deceased persons with Tabbal (iron pointed weapon), whereas accused Dhaneshwar is alleged to have attacked with Lathi, only one injury has been found on the heads of each of the deceased, there is no Lathi injury, therefore, there is variance between ocular and medical evidence, as such, the evidence of these two so called eye witnesses cannot be believed. Learned counsel further submitted that as far as the evidence of Deepa Kumari (PW-4) is concerned, as per the prosecution case, Deepa Kumari was residing in the vicinity of old Basti along with her brother Yashwant (since deceased), whereas, Kirti Kumari was residing in new Basti along with her father Sidhram (since deceased), there is distance between the two Bastis, therefore, it was not possible for Deepa Kumari to have come on the spot to witness the incident, as such, her evidence cannot be believed. While inviting attention of the Court towards Court evidence and police case diary statement under Section 161 of the Cr.P.C., Mr. Bajaj argued that there is variance between Court evidence and police case diary statement. This fact also further supports his argument that Deepa Kumari was not a witness to the incident. He further submitted that no blood has been found on the weapons of offence alleged to have been used in committing the crime. In the circumstances, the accused persons have been falsely implicated in the crime. Learned counsel placed reliance on the judgments of the Apex Court in the matters of **Hem Raj and others v. State of Haryana (2005 Cri.L.J. 2152)** & **Pohlu v. State of Haryana (2006 Cri.L.J. 532)**. Regarding contradiction between medical and ocular evidence, he relied upon the judgment of the Apex Court in the matter of **Ram Swaroop and others v. State of Rajasthan (2004 Cri.L.J. 5043)**.

11. On the other hand, Mr. Ashish Shukla, learned Additional Public Prosecutor supported the judgment of the trial Court.

12. In order to appreciate the arguments advanced by respective counsel, we have examined the record. It is true that Deepa Kumari (PW-4) is sister of

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deceased Yashwant and Kirti Kumari (PW-8) is daughter of deceased Sidhram. Yashwant was nephew of Kirti Kumari. Therefore, these two eyewitnesses are closely related to the deceased persons. It is also admitted position that the time of incident was during the festival of Lord Ganesh and the deity of Lord Ganesh was installed in public street in front of the house of one Gokul Pusad. On the occasion of the festival of Lord Ganesh, people of Village: Lachanpur were offering their prayers and attending various functions during these days at the place where the deity of Lord Ganesh was installed. Case of the prosecution is that on the fateful day i.e. 3-9-2000 in the morning some altercation took place between the accused persons and deceased Yashwant, therefore, Yashwant rushed towards the house of deceased Sidhram & Kirti Kumari (PW-8). Hearing the commotion, Deepa Kumari (PW-4) also rushed towards the house of Sidhram, there in the first instance, she witnessed the accused persons attacking Sidhram and thereafter, Yashwant. At that time, Kirti Kumari was cooking meal, Yashwant came running to their house, picked up Lathi and went outside the house saying that some quarrel has taken place. In the mean time, accused Sonraj came carrying Tabbal in his hand and accused Daneshwar came carrying Lathi in his hand, as both are son & father respectively, they first attacked Sidhram, when he enquired from them as to what has happened, they also attacked Yashwant.

13. It is settled law that the evidence of eyewitness cannot be rejected merely on the ground that they are relative witnesses, therefore, they are interested witnesses. On the contrary, in order to ascertain veracity of the evidence of such witness the Court has to scrutinize the evidence of such witness with care and circumspection.

14. In the matter of **Namdeo v. State of Maharashtra** reported in **2007 AIR SCW 1835**, the Apex Court has held that a close relative cannot be characterized as an 'interested' witness, he is a 'natural' witness, his evidence however, must be scrutinized carefully. If on such scrutiny, his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the 'sole' testimony of such witness. Close relationship of witness with the deceased or victim is no ground to reject his evidence. On the contrary, close relative of the

deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent person.

15. In the matter of **Dalbir Kaur (Mst.) v. State of Punjab** reported in **(1976) 4 SCC 158**, the Apex Court held that the accused killed his own father and real brother over a property dispute. Eyewitnesses to the 'gruesome, brutal and unprovoked' double-murder were near relatives of the deceased. It was, therefore, contended that they were 'interested' witnesses and their evidence should not be accepted for holding the appellants guilty. Negativing the contention and upholding the order of conviction, the Court stated that

> "There can be no doubt that having regard to the fact that the incident took place at mid night inside the house of Ajaib Singh, the only natural witnesses who could be present to see that assault would be Jaswant Kaur and her mother Shiv Kaur. No outsider can be expected to have come at that time because the attack by the appellants was sudden. Moreover, a close relative who is a very natural witness cannot be regarded as an interested witness. The term "interested" postulates that the person concerned must have some direct interest in seeing that the accused person is some how or the other convicted either because he had some animus with the accused or for some other reason. Such is not the case here."

16. In the matter of **Harbans Kaur v. State of Haryana** reported in **(2005) 9 SCC 195**, the conviction of the accused was challenged before the Apex Court, inter alia on the ground that the prosecution version was based on testimony of relatives and hence it did not inspire confidence. Negativing the contention, the Apex Court said:

> "There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield actual culprit and falsely implicate the accused."

17. Further, the Apex Court in the matter of **Harbans Kaur (supra)** ruled that the testimony of the solitary witness can be basis for conviction. Neither the legislature nor the judiciary mandates that there must be particular number of witnesses to record an order of conviction against the accused. Criminal Justice system has always laid emphasis on value, veracity and quality of evidence rather that on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent Court to fully and completely rely on a solitary witness and record conviction. Conversely, it

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may acquit the accused in spite of testimony of several witnesses if it is not satisfied about the quality of evidence. The bald contention that no conviction can be recorded in case of a solitary eye-witness, therefore, has no force and must be negatived.

18. The Apex Court in the matter of **Rizan and another vs. State of Chhattisgarh, through the Chief Secretary, Govt. of Chhattisgarh, Raipur**, reported in **AIR 2003 SC 976**, in para 6, held that "the relationship is not a factor to affect credibility of a witness. It is more often than not a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such a case, the Court has to adopt a careful approach and analyze evidence to find out whether it is cogent and credible."

19. Relying upon the decision of the Apex Court in **State of U.P. vs. Paras Nath Singh and others AIR 1973 SC pg. 1073**, the Division Bench of the Kerala High Court also held in the matter of **Sahadevan Rajan and others vs. State of Kerala 1992 Cri.L.J. 2049** that "the straightforward and trustworthy evidence of relations of the deceased need no corroboration for sustaining the conviction. Such evidence cannot be discarded on the sole ground of interestedness in the prosecution case."

20. In the light of the above principle, if we scrutinize the evidence of Deepa Kumari (PW-4) & Kirti Kumari (PW-8), Kirti Kumari (PW-8), near whose house the incident took place, has stated in her evidence that at about 7 a.m. on the fateful day she inflamed the hearth in order to cook meal, her father was sitting in the house, her nephew Yashwant came from the street, accused Sonraj carrying Tabbal & accused Daneshwar carrying Lathi came to their house, they started abusing on which her father Sidhram asked them not to abuse and why they are abusing, on that Sonraj attacked her father with Tabbal on his head as a result of which he fell down, thereafter, Daneshwar attacked his father with Lathi. Thereafter, they attacked Yashwant, her nephew, Sonraj chased him and attacked with Tabbal. Daneshwar attacked with Lathi as a result of which Yashwant also fell down. Sonraj attacked Yashwant with Tabbal 3-4 times. When she came out, Sonraj threatened her that they will beat her also, therefore, she closed the door and after attacking her father and nephew they ran away. Her father sustained injuries on head and her

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nephew also sustained injuries on head. She brought her father & nephew in the house by dragging them one by one. Looking to place of occurrence and time of occurrence, presence of this witness at the scene of occurrence cannot be doubted. It was morning time, therefore, as a natural course, one has to remain in the house. In cross-examination of this witness defence has not been able to elicit anything which discredits the evidence of this witness.

21. Mr. Bajaj argued that Kirti Kumari (PW-8) has stated in her evidence that she took her father & nephew inside the house from the place of occurrence and as per the prosecution case, both of them had sustained injuries on head and blood was oozing out of the injuries, whereas, no material has been produced by the prosecution in order to establish that blood of Sidhram & Yashwant fell on the clothes of Kirti Kumari or on any article, therefore, her evidence cannot be believed.

22. In the light of the argument advanced by Mr. Bajaj, we have perused the evidence of Kirti Kumari (PW-8). In para 3 of her evidence, she has stated that when the accused persons ran away she dragged her father into the house and thereafter, Yashwant into the house. Nothing has come in cross-examination of this witness that she in any way lifted Sidhram or Yashwant and their bodies touched to her clothes so that some blood fell on her clothes. If any one drags an injured person, who is bleeding, by holding his hands or legs, the injuries were on head, there was no injury on other parts of the body, then it was not possible that the person who has dragged the injured will have any blood spots on his/her cloths.

23. Moreover, Kirti Kumari has stated that her father Sidhram & nephew Yashwant were placed in bullock cart and were being taken to Mungeli hospital in order to provide treatment, but both of them succumbed to the injuries on the way at Fasterpur, there the Police Officer met her. She gave Dehati Nalishi Ex.P-9 in respect of the incident to Virendra Kumar Singh (PW-11), Sub Inspector, Dehati merg intimation Ex.P-10 in respect of Sidhram and Dehati merg intimation Ex.P-11 in respect of Yashwant. Perusal of Dehati Nalishi Ex.P-9, reveals that the manner in which the offence took place has been categorically mentioned, it was given at 3.10 p.m. and distance between the place of occurrence & Fasterpur was 20 kms. Within a reasonable time, this Dehati Nalishi was given by this witness (Kirti Kumari). What she has stated in her Court evidence has

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been categorically mentioned in the Dehati Nalishi. There is no variance between Court evidence and Dehati Nalishi. Therefore, this further establishes the fact that she had witnessed the offence.

24. The case of **Hem Raj (supra)** cited by learned counsel for the appellants is distinguishable on facts and the observation of the Apex Court in that case that there were no blood stains on their clothes is of no help in the present case. In that case, since those witnesses claimed that they picked up the deceased injured person, placed him on the cot and carried him to the hospital, the Court observed that no blood was found on their clothes, therefore, the evidence of this witness cannot be believed. Whereas, in the present case, Kirti Kumari (PW-8) has simply stated that she dragged her father & nephew Sidhram & Yashwant, respectively, in the house. Therefore, there was no occasion that blood must have been found on her clothes.

25. Mr. Bajaj further argued that Deepa Kumari (PW-4) & Yashwant were residing in old vicinity of Lachanpur whereas, Kirti Kumari (PW-8) & Sidhram were residing in new vicinity. The statement made by Deepa Kumari that her house was at a distance of 3-4 houses from the place of occurrence cannot be believed, because one of the witnesses has stated that distance between old and new vicinity is about one furlong. Perusal of the evidence of Radhey Prasad (PW-5) reveals that distance between the two houses is about 100-150 meters. Latel Ram (PW-9) who is a Patwari, a Government servant and an independent witness, in his cross-examination stated that old vicinity and new vicinity are adjacent. Therefore, in view of the above evidence of these two witnesses (PW-5 & PW-9), it cannot be said that the evidence of Deepa Kumari (PW-4) is not correct that her house is at a distance of 3-4 houses from the place of occurrence.

26. As far as the argument about variance between police case diary statement and Court evidence is concerned, Mr. Bajaj invited attention of the Court towards paras 4, 5, 6 & 7 of the evidence of Deepa Kumari (PW-4) wherein it has been stated by her that she disclosed to Police that after hearing the commotion when she came out of the house, she saw accused Sonraj carrying Tabbal and Dineshwar carrying Lathi in their hands, going towards the house of Kirti Kumari, if the same is not written in Ex.D-1 she does not know why it has

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not been written. She also disclosed to the Police that she went towards the house of Kirti Kumari, if the same is not written in her police case diary statement Ex.D-1, then she cannot explain. She also disclosed to the Police that Kirti Kumari also witnessed the incident from the door of her house, if the same is not written in Ex.D-1, then she cannot assign any reason. She further disclosed to the Police that Daneshwar attacked her brother with Lathi, he also attacked Sidhram with Lathi, if the same is not written in Ex.D-1, then she cannot assign any reason. Mr. Bajaj argued that on account of these discrepancies between Court evidence and police case diary statement, the evidence of this witness cannot be believed.

27. Deepa Kumari (PW-4) has stated in her evidence that on the fateful day at about 7 a.m. she was at her residence, she heard commotion from the side of the street, she came out of her house and saw that Sonraj carrying Tabbal & Daneshwar carrying Lathi were going towards the house of her paternal aunt (Kirti Kumari), therefore, she also went towards that side. Her house is at a distance of 3-4 houses from the house of her paternal aunt. She saw that Sonraj attacked her grand-father Sidhram, Sidhram fell down, thereafter, Daneshwar attacked him with Lathi on his head. At that time, her brother Yashwant was standing at certain distance from Sidhram, accused Sonraj attacked him with Tabal as a result of which he fell down, thereafter, Daneshwar also attacked him with Lathi. The incident was also witnessed by Kirti Kumari, she witnessed the crime from the door of her house. Deepa Kumari was frightened after seeing the incident, therefore, she had not gone near the incident.

28. Law laid down by the Apex Court on the point is that discrepancies found in ocular account of the witnesses unless they are so vital, cannot affect the credibility of the evidence of the witnesses. There are bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety.

29. The Apex Court in the matter of **Leela Ram (Dead) through Duli Chand V. State of Haryana and another** reported in **(1999) 9 SCC 525** held that:-

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> ".....the discrepancies found in the ocular account of the witnesses unless they are so vital, cannot affect the credibility of the evidence of the witnesses. There are bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason therefor should not render the evidence of eyewitnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence."

30. In the matter of **State of U.P. V. M.K. Anthony** reported in **(1985) 1 SCC 505**, in para-10, the Apex Court observed that:-

> "While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals."

31. In the matter of **Rammi V. State of M.P.** reported in **(1999) 8 SCC 649**, in para-24, the Apex Court observed that:-

> "When an eyewitness is examined at length it is quite possible for him to make some discrepancies. No true witness can possibly escape from making some discrepant details. Perhaps an untrue witness who is well tutored can successfully make his testimony totally non-discrepant. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence. But too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as

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between two statements of the same witness) is an unrealistic approach for judicial scrutiny."

In paras-25 to 27 it was observed that:-

> "25. It is a common practice in trial courts to make out contradictions from the previous statement of a witness for confronting him during cross-examination. Merely because there is inconsistency in evidence it is not sufficient to impair the credit of the witness.
>
> 26. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Only such of the inconsistent statement which is liable to be 'contradicted' would affect the credit of the witness. Section 145 of the Evidence Act also enables the cross-examiner to use any former statement of the witness, but it cautions that if it is intended to 'contradict' the witness the cross-examiner is enjoined to comply with the formality prescribed therein. Section 162 of Code also permits the cross-examiner to use the previous statement of the witness (recorded under Section 161 of the Code) for the only limited purpose i.e. to 'contradict' the witness.
>
> 27. To contradict a witness, therefore, must be to discredit the particular version of the witness. Unless the former statement has the potency to discredit the present statement, even if the latter is at variance with the former to some extent it would not be helpful to contradict that witness (vide **Tahsildar Singh vs. State of U.P.** reported in **AIR 1959 SC 1012**)."

32. In the light of the above law laid down by the Apex Court, we have perused the evidence of Deepa Kumari (PW-4) and her police case diary statement Ex.D-1. Perusal of the statement Ex.D-1 reveals that she has stated that on the fateful day i.e. 3-9-2000 at about 6.30 a.m. to 7 a.m. she was at her residence, her brother went towards the vicinity, she heard commotion and saw that the accused persons were going towards the house of her grand-father Sidhram, therefore, she also went towards that side following those persons and saw that Sonraj & his son Daneshwar carrying Tabbal & Lathi were attacking her grand-father & brother. Blood was oozing out from their heads, they were lying on the ground and her aunt Kirti Kumari dragged them inside the house. Perusal of the above statement shows that there is no variance between police case diary statement and Court evidence of this witness, what to talk of vital or material contradiction. It is true that the version given by Deepa Kumari before the Court is in detail, whereas, in police case diary statement Ex.D-1 which is written by the Investigating Officer in his own manner, all the material points viz.,

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hearing commotion, coming out from the house, seeing the accused persons going towards the house of Sidhram following them, accused Sonraj carrying Tabbal & Daneshwar carrying Lathi attacked her grand-father Sidhram & brother Yashwant, both sustaining injuries on head thereafter, dragging Sidhram & Yashwant by Kirti Kumari inside the house, have also been mentioned. Deepa Kumari has also stated in her police case diary statement that Kirti Kumari dragged the deceased persons inside the house. Therefore, there is no question that Deepa Kumari has not stated that Kirti Kumari has not witnessed the incident. In the light of the above judgments of the Apex Court, we are of the considered opinion that there is no material contradiction or variance between Court evidence or police case diary statement of this witness.

33. In the circumstances, evidence of Deepa Kumari (PW-4) & Kirti Kumari (PW-8) establish their presence at the time of occurrence. Their evidence supports the prosecution version in material particulars and they cannot be held to be created witnesses.

34. Now, coming to the point of non-examination of independent witness, in the first instance, one witness namely, Vishnu Prasad (PW-1) has been examined, but he has been declared hostile. Sukhdev Das (PW-2) has also been examined who has stated in his evidence that he reached on the spot and saw Sidhram & Yashwant in injured condition, there were injuries on their heads, but at that time the accused persons were not there. In the first instance, it is common knowledge that in criminal activities normally independent witnesses do not come forward to speak against criminals, as they do not want to antagonize the accused persons. Therefore, non-examination of independent witness cannot be said to be fatal in every case. Only in cases where the evidence of relative witness is not sterling worth, is shaky in nature, does not inspire full confidence of the Court, suffer from inherent weakness, then such evidence requires corroboration from independent witness, in order to convict the accused, in case implicit reliance cannot be placed on relative evidence. In other cases conviction can be rest on the evidence of relative witness.

35. In the present case, evidence of Deepa Kumari (PW-4) & Kirti Kumari (PW-8) have been scrutinized and evaluated in the light of the arguments advanced by Mr. S.L. Bajaj. Their evidence inspire confidence and their evidence stood up to the scrutiny in order to ascertain the veracity of their

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evidence. Therefore, if no other independent witness has been examined by the prosecution, that does not affect the prosecution case.

36. Now, coming to variance between medical and ocular evidence, in the matter of **Thaman Kumar v. State of U.T. of Chandigarh** reported in **(2003) 6 SCC 380**, at page 389 para 16, the Apex Court held that

> "The conflict between oral testimony and medical evidence can be of varied dimensions and shapes. There may be a case where there is total absence of injuries which are normally caused by a particular weapon. There is another category where though the injuries found on the victim or of the type which are possible by the weapon of assault, but the size and dimension of the injuries do not exactly tally with the size and dimension of the weapon. The third category can be where the injuries found on the victim are such which are normally caused by the weapon of assault but they are not found on that portion of the body where they are deposed to have bee caused by the eyewitnesses. The same kind of inference cannot be drawn in the three categories of apparent conflict in oral and medical evidence enumerated above. In the first category it may legitimately be inferred that the oral evidence regarding assault having been made from a particular weapon is not truthful. However, in the second and third categories no such inference can straightaway be drawn. The manner and method of assault, the position of the victim, the resistance offered by him, the opportunity available to the witnesses to see the occurrence like their distance, presence of light and many other similar factors will have to be taken into consideration in judging the reliability of ocular testimony."

37. In the matter of **Mani Ram v. State of U.P.** reported in **1994 Supp (2) SCC 289**, the appellant was convicted under Section 302 IPC. The only eyewitness admitted in his cross-examination that the deceased was shot on his back while he was running, whereas the injury as per the medical evidence was on the right shoulder and front side of the upper arm of the deceased. Acquitting the appellant, the Apex Court held in para 9 that

> "It is well settled by long series of decisions of this Court that where the direct evidence is not supported by the expert evidence then the evidence is wanting in the most material part of the prosecution case and, therefore, it would be difficult to convict the accused on the basis of such evidence. If the evidence of the prosecution witnesses is totally inconsistent with the medical evidence this is a most fundamental defect in the prosecution case and unless this inconsistency is reasonably explained it is sufficient not only to discredit the evidence but the entire case."

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38. In the light of the above judgment, if we examine the present case, Dr. Vibha Sindur (PW-6), who has conducted post-mortem has stated in her evidence, in respect of deceased Sidhram, that there was a big haemotoma in left side of parietal temporal region, incised perforated wound above left ear in temporal area, the bone was fractured, brain was lacerated and there was intracranial haemotoma. In respect of deceased Yashwant, she has stated that there was bleeding from right ear, nostril & mouth, on examination it was found that on left parietal region there was incised wound, perforating pierced wound, bone was fractured and there was haemotoma near the injury. In para 12 of her evidence, she has stated that she had examined Lathi & Tabbal and the injuries which were found on the bodies of Sidhram & Yashwant could be caused by both the weapons. Tabbal is an iron weapon with pointed corners. Therefore, if injuries were inflicted by Tabbal such injuries were possible. Thereafter, if Lathi blow is also given on the same place, then such injuries are possible. The doctor has also stated that there was haemotoma apart from perforated injury.

39. In the circumstances, in all possibilities it cannot be said that the injuries which were found on the bodies of Sidhram & Yashwant were not possible to be caused by these weapons which the accused persons were holding, as such, there is no variance between medical and ocular evidence.

40. Medical evidence is an expert's evidence of a doctor and it is the opinion of an expert form the field of science which is admissible under Section 45 of the Evidence Act. A medical witness is an expert to assist the court, he is not a witness of fact it is advisory in character. As a general rule, oral evidence is given preference over medical evidence, in case of minor contradictions between the two. But where the medical evidence completely rules out the oral evidence, medical evidence is relied upon by the Courts for deciding the guilt of the accused. The value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. Unless, however, the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eyewitnesses, the testimony of the eyewitnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence.

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41. In the present case, injuries found on the heads of deceased Sidhram & Yashwant could be caused by Tabbal. By Lathi blow the injury of fracture and haemotoma could be caused. Therefore, there is no contradiction between medical and ocular evidence.

42. As far as the argument of learned counsel for the appellants that no blood stains were found on weapons of offence is concerned, as per the F.S.L. report Ex.P-31, blood was found on Tabbal, however, no blood was found on Lathi. Even at the time of recovery of Lathi, there was no blood on it. Therefore, it cannot be said that the accused persons cannot be connected with the crime in question on account of this discrepancy. In the first instance, the doctor has stated in her evidence that the injuries found on the bodies of Sidhram & Yashwant could be caused by these weapons. Moreover, blood has been found on Tabbal as per the F.S.L. report. Therefore, on the ground that no blood has been found on Lathi, it cannot be held that it was not used in commission of crime.

43. In the matter of **State of Rajasthan vs. Teja Ram and others** reported in **(1999) 3 SCC 507**, in para 27 the Apex Court held that "it cannot be said that in all cases where there was failure of detecting the origin of the blood, the circumstance arising from recovery of the weapon would stand relegated to disutility". Similarly, in the matter of **Sanjay alias Kaka vs. State (NCT of Delhi)** reported in **(2001) 3 SCC 190**, the Apex Court held that "prosecution's failure to prove origin of blood found on the pant and shirt of the accused who was alleged to have killed the deceased by inflicting dagger injuries – Held on facts, not sufficient to hold that the accused was not guilty of offence of murder".

44. As far as the judgments cited by learned counsel for the appellants, in the matter of **Pohlu (supra)**, the Apex Court held that in the F.I.R. the informant eyewitness named only three persons, whereas later she added two other accused persons, the place of occurrence was also shifted and the other eyewitness, son of the deceased, stated during the course of investigation that his father had been assaulted only by main accused, thereafter in the Court evidence he involved all the accused persons. Therefore, the Court held that both the eyewitnesses are not reliable, particularly when one of the injured persons was not examined. In the circumstances, above case is distinguishable on facts and does not apply to the facts of the present case.

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45. Similarly, the judgment of the Apex in the matter of **Ram Swaroop (supra)** is also distinguishable on facts for the reason that in that case so called eyewitness, wife of the deceased, stated that one of the accused assaulted the deceased whereas in F.I.R. lodged by son of the deceased it was not mentioned that the said accused had caused injuries to the deceased. The evidence of wife of the deceased was contrary to the evidence of other witnesses who stated that it was other accused who assaulted deceased on his head. Moreover number and nature of injuries caused by accused as deposed to by her was wholly inconsistent with medical evidence on record. Even her version regarding the assault made by remaining accused persons was not believed. Therefore, the testimony of that witness was not accepted. Version of a witness was quite different from what has been mentioned in the F.I.R. and also in his statement recorded in the course of investigation. Hence, the Court held that the person was not an eyewitness to the incident. In the circumstances, this case is also not applicable to the facts and circumstances of the present case and it is distinguishable on facts. In the present case, evidence of Deepa Kumari (PW-4) & Kirti Kumari (PW-8) is consistent in all respects as has been discussed earlier.

46. No other point was argued by learned counsel for the accused/appellants.

47. In the result, we do not find any illegality or infirmity in the judgment of the trial Court, there is no merit in this appeal, same is liable to be dismissed and it is hereby dismissed.

Sd/-
L.C. Bhadoo
Judge

Sd/-
Sunil Kumar Sinha
Judge

Soma